

## **NORTH CAROLINA EDUCATION LOTTERY POLICIES AND PROCEDURES MANUAL**

### **CHAPTER 6 – LEGAL POLICIES**

#### **6.02 – VENDOR DISPUTE RESOLUTION**

##### **SCOPE**

These Dispute Resolution Procedures apply to and shall constitute the exclusive procedure for binding resolution of all claims, disputes, complaints and Dispute Resolution Requests of any kind filed by an Aggrieved Person relating in any way to any agreement entered into by the NCEL, whether in an administrative proceeding or litigation, at law or equity, including, but not limited to, those arising out of or relating to any aspect of a solicitation or bid or a failure to conduct a solicitation or bid, the performance of any party, the interpretation of any contractual provision, the applicability or interpretation of any law, rule or regulation, or any decision to award, deny, suspend or cancel, terminate or not renew any contract or agreement.

##### **DEFINITIONS (see *appendix A*)**

Capitalized terms used herein shall have the meanings set forth in Appendix (A) attached hereto, unless otherwise defined in context.

##### **FILING OF A DISPUTE RESOLUTION REQUEST**

- A. Any Aggrieved Person may file a Dispute Resolution Request seeking a determination with respect to any matter which is included within the scope of these Dispute Resolution Procedures as set forth in the Scope of these policies. An Aggrieved Person who files a Dispute Resolution Request is hereinafter referred to as a "Petitioner." Other than expressly set forth in these Dispute Resolution Procedures, nothing contained herein shall confer any rights or remedies upon any Aggrieved Person and/or Petitioner, or impose any duties or obligations upon the NCEL, which are not otherwise so conferred or imposed by the Act.
- B. The Dispute Resolution Request shall be in writing, shall be filed by delivery by hand or courier to the Director with a copy to the Legal Counsel of the NCEL at the address listed below, or at such other address at which the headquarters of the NCEL may be located from time to time:

##### **IF DELIVERED SOLELY BY US POSTAL SERVICE**

Director  
North Carolina Education Lottery Protest  
2100 Yonkers Road  
Raleigh, NC 27604

##### **IF DELIVERED SOLELY BY US POSTAL SERVICE**

Legal Counsel  
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- C. The Dispute Resolution Request shall include the following information:
1. The name, address and telephone number of the Petitioner;
  2. The signature of the Petitioner;
  3. Identification of the solicitation or contract number or other matter that is the subject of the dispute;
  4. a statement of the legal and factual grounds supporting the position of the Petitioner, including copies of relevant documents;
  5. Any other documentation the Petitioner wishes to submit in support of Petitioner's position; and
  6. A statement of the relief requested whether legal, equitable or otherwise. If a monetary award is requested, the amount shall be stated.

For a Dispute Resolution Request to be timely filed, the original Dispute Resolution Request manually signed by the Petitioner must be physically received by the NCEL within the time period prescribed in Time for Filing a Dispute Resolution Request Section below. Facsimile or any other electronically transmitted copies of the Dispute Resolution Request will not be accepted.

- D. The Petitioner shall be required to provide a suitable Dispute Bond (as defined in the filing of a dispute resolution request section) to the NCEL in certified funds at the time the Dispute Resolution Request is filed. The purpose of this bond is to:
1. Discourage frivolous Dispute Resolution Requests and litigation;
  2. Assure payment by the Petitioner of the costs incurred as a result of the Dispute Resolution Request, including reasonable attorney's

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fees of the Commission, in the event Petitioner appeals and such costs are adjudged against the Petitioner; and

3. Assure payment of all other amounts for which the Petitioner may be found liable, including, but not limited to, any loss of income to the NCEL resulting from the institution of a frivolous or unsuccessful appeal.

Failure to provide such Dispute Bond with any Dispute Resolution Request will result in the dismissal of such Dispute Resolution Request. An Aggrieved Person/Petitioner shall not have met the requirement in Time for Filing a Dispute Resolution Request Section timely file a Dispute Resolution Request unless the applicable Dispute Bond accompanies the Dispute Resolution Request when it is timely filed. This requirement does not apply to any Petitioner who has already provided a Dispute Bond in the proper Dispute Bond amount as part of a bidding process.

- E. The amount of the Dispute Bond shall be the amount established in the applicable solicitation; provided, however, in the event that no amount is specified in the applicable solicitation, the Dispute Bond shall be the lesser of One Million Dollars (\$1,000,000.00) or ten percent (10%) of the contract amount in controversy.

#### **TIME FOR FILING A DISPUTE RESOLUTION REQUEST**

- A. Dispute Resolution Requests concerning a solicitation.

1. A Dispute Resolution Request in regard to a Major Procurement Contract solicitation for which the basis for the Dispute Resolution Request is apparent before the closing date for receipt of initial proposals shall be filed within five (5) business days after the deadline for Vendor questions established in the solicitation. A Dispute Resolution Request in regard to any other solicitation for which the basis for the Dispute Resolution Request is apparent before the closing date for receipt of initial proposals. Dispute Resolution Requests based upon a solicitation that are apparent before the bid opening shall be filed before bid opening.
2. Dispute Resolution Requests based upon an amendment to any solicitation, or upon any additional information requested or accepted by the NCEL with respect to any solicitation or response thereto, that are apparent before the closing date for receipt of

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proposals or any supplemental information requested by the NCEL shall be filed within five (5) business days after the deadline for Vendor questions or the date of the amendment, whichever date is later.

3. Subject to the provisions of Section 1.04C, if a Dispute Resolution Request is timely filed in accordance with these Dispute Resolution Procedures before the award of a contract, the award of such contract may be made before a decision is rendered on the Dispute Resolution Request.
- B. If the Commission or Director announces it's intent not to require competitive bidding of a Major Procurement Contract, the Dispute Resolution Request must be filed within five (5) business days of the date such announcement is made, posted, published or otherwise made available to the public.
- C. Dispute Resolution concerning an award of contract.
1. Any Aggrieved Person may protest the NCEL's decision to award a contract. Any such written Dispute Resolution Request shall be filed in the case of either a contract that has not been competitively bid by the NCEL or a contract that has been competitively bid by the NCEL, within five (5) business days after the earlier to occur of: (a) the NCEL's issuance of a notice of intent to award such contract; or (b) the NCEL's award of such contract is posted, published or otherwise made publicly available; or (c) the execution of any such contract.
  2. If a Dispute Resolution Request seeking equitable relief regarding the award of any contract is filed with the Legal Counsel of the NCEL in accordance with the Time for Filing a Dispute Resolution Request Section and before a contract is executed, the NCEL may nonetheless award and enter into such contract if either: (a) such Dispute Resolution Request shall have been resolved in accordance with these Dispute Resolution Procedures, or (b) the Commission shall have made a written determination that the award of such contract without delay is necessary to protect substantial interests of the NCEL.
  3. If a Dispute Resolution Request seeking equitable relief regarding the award of any contract is timely filed in accordance with these

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Dispute Resolution Procedures after a contract is executed, the NCEL and other party or parties to such contract may nonetheless continue to perform in accordance therewith until such Dispute Resolution Request shall have been resolved in accordance with these Dispute Resolution Procedures such that the contract must be set aside and/or terminated and no further work can be performed thereunder. By submitting a bid or proposal governed by these Dispute Resolution Procedures, each Vendor acknowledges and agrees that at any time that the Commission determines that the award and performance of a contract without delay is necessary to protect substantial interests of the NCEL, such award and contract shall not be enjoined, and by submitting such bid or proposal all Vendors waive any right they might have had to seek injunctive relief to enjoin such award or contract there being deemed to be an important state need, and adequate remedy at law, a waiver of injunctive relief by the Aggrieved Person Vendor and an otherwise available mechanism to remedy any contract issues by either terminating it or awarding a new contract or re-bidding the contract.

- D. In all other cases pertaining to a solicitation or award of an agreement or a contract other than those covered in Time for Filing a Dispute Resolution Request Section of these regulations, a Dispute Resolution Request must be filed within five (5) business days after the earlier to occur of: (1) the announcement of the Commission's decision to award is posted, published or otherwise made publicly available; or (2) the NCEL's issuance of a notice of intent to award such contract; or (3) the execution of any such contract.
- E. In all cases other than those covered in Time for Filing a Dispute Resolution Request Section, the Dispute Resolution Request must be filed within five (5) business days after the Aggrieved Person knows or should have known of the facts giving rise to the action complained of.
- F. Failure to file a written Dispute Resolution Request in accord with the Filing of a Dispute Resolution Request Section within the applicable time limit provided in Time for Filing a Dispute Resolution Request Section shall bar any further administrative, legal, or equitable action of any kind or nature and in any body, court or agency. Time is of the essence in the various procurements of the NCEL.

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- G. Failure to provide the applicable Dispute Bond in the amount required and as otherwise provided in the Filing of a Dispute Resolution Request Section within the applicable time frame shall result in an untimely filing and bar any further administrative, legal, or equitable action of any kind or nature and in any body, court or agency.

#### **NOTICE OF FILING OF A DISPUTE RESOLUTION REQUEST**

In the event a Dispute Resolution Request is filed, the Director shall immediately give notice of the Dispute Resolution Request to the Commission and to the successful person or entity, if an award has been made or a contract entered into, or, if no award has been made or contract entered into, to all persons or entities who have timely submitted responsive bids or proposals on that procurement.

#### **CONFIDENTIAL INFORMATION**

- A. Material submitted by a Petitioner shall not be withheld from any interested party except to the extent required by law.
- B. If the Petitioner believes the Dispute Resolution Request contains confidential information or trade secrets, it must comply with all relevant provisions of the North Carolina Public Records Act to attempt to secure confidential treatment thereof; provided, however, all Petitioners acknowledge that the NCEL is subject to the Public Records Act and Open Meetings Laws of the State of North Carolina, and thus the NCEL is not liable for any disclosure of any material submitted by any Petitioner regardless of the circumstances.

#### **DECISION BY THE DIRECTOR OR DESIGNATED HEARING OFFICER**

- A. The Director (or his Designated Hearing Officer), shall have the exclusive authority to decide all Dispute Resolution Requests.
- B. The Director (or his Designated Hearing Officer) shall issue a written decision within thirty (30) calendar days after a Dispute Resolution Request has been filed. The decision shall include:
1. A brief description of the claim;
  2. A reference to the pertinent contract provision;

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3. A brief statement of the factual and legal issues raised or implicated;
  4. A statement of the Director's decision, findings of facts and conclusions of law, with supporting rationale and the remedial action and/or award, if any.
- C. The Director (or his Designated Hearing Officer) shall furnish a copy of the decision to the Petitioner by certified mail, return receipt requested, or by any other method that provides written evidence of delivery, such as hand delivery by courier, express mail or overnight express courier.
- D. The time limit for decisions set forth in the Decision by the Director or Designated Hearing Officer may be extended by the Director (or his Designated Hearing Officer), in his discretion, for good cause for a reasonable time not to exceed thirty (30) additional calendar days. The Director (or his Designated Hearing Officer) shall notify the Petitioner in writing that the time for the issuance of a decision has been extended and the date by which a decision will be issued.
- E. If the Director (or his Designated Hearing Officer) fails to issue a decision within the time limits set forth in the Decision by the Director or Designated Hearing Officer Section, the Petitioner may proceed as if the Director (or his Designated Hearing Officer) had issued an adverse decision to the Petitioner.
- F. In lieu of a written decision, the Director may, in his sole discretion, within thirty (30) calendar days after a Dispute Resolution Request is filed, give written notice to the Petitioner that the Dispute Resolution Request shall be resolved by a hearing conducted by the Director (or his Designated Hearing Officer) pursuant to the procedures for hearings set forth in the Hearing Procedures Section. Notwithstanding the foregoing, the Commission may at any time on its own motion direct that a Dispute Resolution Request be resolved by a hearing conducted by the Director (or his Designated Hearing Officer) pursuant to the procedures for hearings set forth in the Hearing Procedures Section.

#### **HEARING PROCEDURES**

- A. All hearings conducted under this Section shall be conducted by the Director (or his Designated Hearing Officer). The decision as to whether the Director or a Designated Hearing Officer will conduct the

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hearing shall be in the sole discretion of the Director. In either case, any Hearing Officer's actions, decisions and orders shall be deemed to be on behalf of the Director and effective as though taken by the Director, subject to the appeals procedures as hereinafter provided.

- B. If the Director determines under the Decision by the Director or Designated Hearing Officer Section that the Dispute Resolution Request will be resolved after a hearing, the hearing shall be held within thirty (30) calendar days following the Director's determination under the Decision by the Director or Designated Hearing Officer Section to resolve a Dispute Resolution Request by this procedure for a hearing. A notice which will set forth the time, date and location of the hearing will be sent to the party or parties at least seven (7) calendar days before the date set for such hearing.
- C. In connection with the hearing, the Hearing Officer may:
1. Conduct the hearing in an informal manner without formal rules of evidence or procedure;
  2. Hold pre-hearing conferences to:
    - a. settle, simplify or identify the issues involved in the hearing;
    - b. consider other matters that may aid in the expeditious disposition of the hearing;
    - c. rule on any parties' request for injunctive or other equitable relief;
  3. Require each party to state, either orally or in writing, its position concerning the factual and legal issues involved in the hearing;
  4. Require each party to produce for examination those relevant witnesses and documents under its control;
  5. Rule on motions and other procedural items pending before him or her, including, without limitation, the methods, scope and extend of discovery available to the parties;
  6. Regulate the course of the hearing and conduct of the participants, including the imposition of reasonable time limits;



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7. Establish time limits for submission of motions or memoranda;
  8. Take official notice of any material fact not appearing in evidence in the record, if the fact is among the traditional matters of which judicial notice can be taken;
  9. Administer oaths or affirmations;
  10. Issue subpoenas; and
  11. Join any necessary parties to the hearing.
- D. The hearing shall be conducted before a court reporter. The Petitioner shall procure at Petitioner's own cost and on Petitioner's own initiative, the court reporting services (including the preparation of the transcript) for such hearing. If the Petitioner fails to do so, the Hearing Officer may suspend such hearing until the Petitioner has provided the court reporter, or the Hearing Officer may supply a court reporter and assess the costs thereof against Petitioner. The original transcript of any such proceedings shall be submitted to the Hearing Officer as soon as the transcript is available, and in no event later than five (5) calendar days following the conclusion of the hearing, and shall be made a part of the record. The Petitioner shall also submit a copy of the transcript (at Petitioner's expense) to all other parties to the Dispute Resolution Request as soon as the transcript is available.
- E. Any party may appear and be represented with or without counsel at the hearing.
- F. If a Hearing Officer, other than the Director, conducts the hearing, such Hearing Officer shall make a written recommendation containing the Hearing Officer's ruling, in the form of a Proposed Decision, to the Director, within thirty (30) calendar days after receiving an original transcript of the hearing pursuant to the Hearing Procedures Section above and deliver a copy of the Proposed Decision to the Petitioner. If a Proposed Decision is received by the Director, he must render his final and binding decision in writing and deliver the decision to the parties within thirty (30) calendar days after receiving the Proposed Decision from the Hearing Officer.

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1. If the Director received a recommendation in a Proposed Decision from a Hearing Officer other than himself, he may:
    - a. accept, modify or reject the Hearing Officer's recommendation in whole or in part;
    - b. return the matter to that Hearing Officer with instructions;
    - c. make any other appropriate disposition; or
    - d. issue a no action response.
  2. If the Director issues a no action response, then the determination in the Proposed Decision of the Hearing Officer will be deemed to be accepted by the Director.
- G. If the Director conducts the hearing, he must render a decision in writing and deliver the decision to the Petitioner within thirty (30) calendar days after receiving an original transcript of the hearing.
- H. The Director's final and binding decision (and any previous recommended Proposed Decision made by a Designated Hearing Officer) shall be sent to the Petitioner by certified mail, return receipt requested, or any other method by which a written business record of delivery is kept, such as hand delivery by courier, express mail or overnight express courier.

#### **PROCEDURE FOR FILING AN APPEAL TO THE COMMISSION**

- A. A Petitioner may appeal a decision of the Director solely to the Commission. Any appeal from a decision of the Director must be filed with the Commission within five (5) business days after receipt of such decision.
- B. Any appeal shall be filed by delivery by hand or courier, to the Director with a copy to the Legal Counsel of the NCEL at the address listed below, or at such other address at which the headquarters of the NCEL may be located from time to time:

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Director  
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2100 Yonkers Road  
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**IF DELIVERED BY OTHER MEANS  
(INCLUDING HAND DELIVERY)**

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An appeal so delivered will be timely filed only if received by the NCEL at the above-stated address during its normal business hours on or before the fifth (5<sup>th</sup>) business day prescribed by the Procedure for Filing an Appeal to the Commission Section above.

- C. Every appeal must be in writing and shall contain the following:
  - 1. Copy of the decision of the Director;
  - 2. A copy of the transcript of any hearing; and
  - 3. The basis for the precise factual or legal error in the decision of the Director from which the appeal is taken.
- D. The Commission may notify any other individuals or entities which it, in its sole discretion, determines it wishes to notify of the appeal (by certified mail, return receipt requested, or any other method by which a written business record of delivery is kept, such as hand delivery by courier, express mail or overnight express courier) within five (5) calendar days after the appeal is filed.
- E. Any interested party may file a written brief stating its position on the appeal within five (5) business days after receipt of such notice.

#### **COMMISSION'S DECISION**

- A. The Commission, or a committee of the Commission, may review the record without a hearing or oral argument and issue a written decision on

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behalf of the Commission. The Commission, or a committee of the Commission, may, in the manner and under procedures that the Commission or its committee shall deem appropriate under the circumstances in its sole discretion: (1) conduct its own review or investigation; (2) a de novo review in whole or in part; or (3) allow oral argument.

- B. A copy of the Commission's written decision will be sent to the appellant by certified mail, return receipt requested, or any other method by which a written business record of delivery is kept, such as hand delivery by courier, express mail or overnight express courier. The original written decision shall be retained by the Commission. The written decision of the Commission, or a committee of the Commission, will be final, and no further appeal to the Commission will be allowed.

#### **JUDICIAL REVIEW**

Only after exhaustion of all remedies and procedures in these Dispute Resolution Procedures of the NCEL, if applicable law permits any further appeals, any such appeal must be brought solely in the Superior Court of Wake County, North Carolina. By submitting a bid covered by these Dispute Resolution Procedures, Vendor irrevocably waives, to the fullest extent permitted by law, any right which it has to appeal any final decisions of the Commission made pursuant to these Dispute Resolution Procedures, and Vendor irrevocably waives any objection which it has to the venue of any appeal being solely in the Superior Court of Wake County, North Carolina.

#### **EXCLUSIVE REMEDY**

These Dispute Resolution Procedures provide the exclusive procedure for asserting a claim against the NCEL arising out of or relating to any matter which is within the scope of these Dispute Resolution Procedures as set forth in the Scope of these policies. Neither an Aggrieved Person, Petitioner nor any other interested party has a right to any remedy against the NCEL with respect to a matter within the scope of the Scope of these policies, except in accordance with the procedures set forth in these Dispute Resolution Procedures.

#### **AMENDMENT**

These Dispute Resolution Procedures may be amended from time to time by the Commission. Any Aggrieved Person or other individual or entity may, and should, obtain the latest version of these Dispute Resolution Procedures before

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proceeding in connection with any Dispute Resolution Request or dispute governed hereby.